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belief that he is heir to the person last seized should be deemed otherwise."[18] The only reason why a deed is necessary for color is to show the extent of the claim, and this may equally appear by oral evidence or matter *in pais*.[19]

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THE DOCTRINE OF ANTICIPATORY BREACH IN NEW YORK.—The doctrine of anticipatory breach was first noted by the courts of New York in 1861;[1] but it was not squarely passed upon until 1870, in a case involving a contract to marry.[2] The decision of the court in that case seems to have been seriously influenced by the thought of the plaintiff's wounded feelings. Because of the peculiar nature of contracts to marry, it was hardly to be expected that the rule of this decision should be applied to cases where a different kind of contract was under consideration. Yet in a later case,[3] which involved a contract for personal services, the judge who wrote the opinion, reasoning by analogy from the *Burtis Case*, declared by way of *obiter*, that the plaintiff might recover for an anticipatory breach; and said that he was unable to see any appreciable distinction between a contract to marry and a contract for personal services. The other judges while concurring in the result reached, refused to express any views as to the soundness of the doctrine of anticipatory breach. It was intimated in the opinion, however, following a dictum to the same effect in the *Burtis Case*, that the same reasoning would scarcely be extended to mere promises to pay money. And so, merely on the strength of this same dictum in the *Burtis Case*, as a reading of the opinion will show, a comparatively recent case decided that there could be no anticipatory breach of a contract to pay money.[4] Some years after the decision in *Howard* v. *Daly*, in a case involving a contract for the sale and delivery of goods in future installments, it was held that the plaintiff was entitled to recover for an anticipatory breach.[5]

It is in these cases of installment contracts to deliver goods, that the courts have most frequently applied the doctrine of anticipatory breach. And the results are not wholly satisfactory. The difficulty seems to be due to the apparent failure to distinguish between entire

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[18]McCall *v.* Neely, *supra*, at p. 72.

[19]See dissenting opinion in Tenn. Coal, Iron & R. R. Co. *v.* Linn (1898) 123 Ala. 112.

[1]Crist *v.* Armour (N. Y. 1861) 34 Barb. 378.

[2]Burtis *v.* Thompson (1870) 42 N. Y. 246. While the doctrine of anticipatory breach can hardly be supported on principle, it was accepted in England in the case of Hochster *v.* De La Tour (1853) 2 E. & B. 678, and in the United States it has been adopted by the great weight of authority. See 4 Columbia Law Rev., 64. Pollock, Contracts (3rd Am. Ed.) 355 *et seq*, and note to that page: "It need hardly be said that the doctrine of anticipatory breach is peculiar to our law."

[3]Howard *v.* Daly (1875) 61 N. Y. 362. The court here found evidence of an actual breach, which was all that was necessary for the decision of the case. In another case decided the same year the court pointed out that the question was far from settled in this State. See Freer *v.* Denton (1875) 61 N. Y. 492.

[4]Tanenbaum *v.* Federal Match Co. (N. Y. 1905) 102 App. Div. 524.

[5]Windmuller *v.* Pope (1887) 107 N. Y. 674.

and severable contracts.[6] If the contract is entire, and one party at the day for performance refuses to perform the installment, this, it is submitted, is an actual breach of the entire contract.[7] If one party before the day for performance of an installment of an entire contract refuses to perform, this would be an anticipatory breach. Yet where facts would seem to warrant the finding of an actual breach, the doctrine of anticipatory breach has been held applicable.[8] In the case of a severable contract, however, the refusal to perform an installment at the day for performance would be a breach, not of the whole contract, but solely of that particular installment. Only if at or before the day for performance of one of the installments of such a contract, the party to perform repudiated the whole contract, would there be a true anticipatory breach.

From the foregoing analysis it appears that the doctrine of anticipatory breach, though frequently adverted to, has been extended to very few classes of contracts. In fact, as is pointed out in the recent case of *Werner* v. *Werner* (N. Y., App. Div. 1st Dept. 1915) 169 App. Div. 9, it is generally considered as settled that the doctrine does not apply to contracts for the payment of money, but is limited to contracts to marry, contracts for personal services (unsupported by any square holding), and contracts for the sale and delivery of goods.[9]

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[6]For the distinction between entire and severable contracts, and the tests for each, see Clark *v.* West (N. Y. 1910) 137 App. Div. 23, affd. (1911) 201 N. Y. 569; Walsh *v.* N. Y. & Ky. Co. (N. Y. 1903) 88 App. Div. 477; Tipton *v.* Feitner (1854) 20 N. Y. 423; Ming *v.* Corbin (1894) 142 N. Y. 334; White *v.* Livingston (N. Y. 1902) 69 App. Div. 361, affd. (1903) 174 N. Y. 538.

[7]But the cases hold that mere delay in paying one installment while it may entitle the other party to rescind and sue on a *quantum meruit,* or to proceed with performance and bring suit to recover the past installment due, will not entitle him to sue for breach of the contract. To authorize him to sue for loss of profits, an abandonment by the defendant of the contract must appear. See Wharton *v.* Winch (1893) 140 N. Y. 287; Jones *v.* City of New York (N. Y. 1901) 57 App. Div. 403, affd. (1902) 170 N. Y. 580; Dubois *v.* Delaware etc. Canal Co. (N. Y. 1830) 4 Wend. 285. But this in many cases seems hardly sound. One party cannot rescind except for a breach by the other, and if there is a breach the former ought to be allowed to recover damages for it.

[8]For example, Nichols *v.* Scranton Steel Co. (1893) 137 N. Y. 471; Wills *v.* Simmonds (N. Y. 1876) 8 Hun 189; Seymour *v.* Warren (N. Y. 1906) 114 App. Div. 813; Rubber Trading Co. *v.* Manhattan Rubber Mfg. Co. (N. Y. 1914) 164 App. Div. 477; all seem to be cases of entire contracts, and the breaches actual and not anticipatory as the courts seem to consider them.

[9]See Nichols *v.* Scranton Steel Co., *supra*; Benecke *v.* Haebler (N. Y. 1899) 38 App. Div. 344; Kelly *v.* Security Mutual Life Ins. Co. (1906) 186 N. Y. 16; Adenaw *v.* Piffard (1911) 202 N. Y. 122; Ga Nun *v.* Palmer (1911) 202 N. Y. 483. In Kelly *v.* Security etc., Ins. Co., *supra,* the court held that there could be no anticipatory breach of an insurance contract, but that the remedy for the plaintiff was in equity, as pointed out in Langan *v.* Supreme Council (1903) 174 N. Y. 266, by which decision this court felt bound. It is submitted that the latter case is not one of anticipatory breach at all, but of an actual breach in the refusal to accept premiums. The *Kelly Case,* however, involved a true anticipatory breach and there Edward T. Bartlett, J., dissenting vigorously from the majority opinion, pointed out the difference in the facts of the two cases and insisted that there was no reason why the doctrine of anticipatory breach should not include such a case as the one then under consideration.

The expression of the court indicates that they did not believe there was any distinction in principle between a contract to pay money in future installments and a contract to deliver goods in future installments. It is to be noted, moreover, that the courts in general, either give no reason at all for the limitations laid down, or else the reasons given apply equally well to those cases where the doctrine is recognized. In fact, there is no logical middle ground between entire adoption or repudiation of the doctrine; and where such a middle ground is taken, as it is in New York, it seems to indicate a feeling that the whole theory is not sound. It is to be hoped that when the proper case comes up this doctrine will be repudiated, or at least circumscribed within the narrowest limits marked out by the square holdings on the point. No harm would come from the repudiation of such an unsound principle for no established property rights are involved; and the results attempted to be reached could better be attained by other and simpler means in holding, as was done in one case,[10] that the repudiation by one party before the day for performance operates as a waiver of the conditions precedent binding upon the other party and when the day for performance has passed, entitles the latter to sue for the breach.

[10]Shaw *v.* Republic Life Ins. Co. (1877) 69 N. Y. 286; see 4 Columbia Law Rev., 64.